APPEAL NO. 94177

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held on January 10, 1994, in (city), Texas, (hearing officer) presiding as hearing officer. She determined that the respondent (claimant) was injured in the course and scope of her employment on (date of injury), that the appellant (employer/carrier) did not contest compensability on or before the 60th day after being notified of the injury, that the late contest of compensability was not based upon newly discovered evidence and that the claimant had disability from (date of injury), up to date of the contested case hearing. Employer/carrier appeals urging that the evidence is insufficient to establish that the claimant sustained an injury to her back on (date of injury), that she suffered any disability as a result of the alleged (date of injury), incident and that the evidence supports that the employer/carrier "did timely contest the extension of the injury from the ankle to the back." No response has been filed.

DECISION

Finding evidence sufficient to support the decision and order of the hearing officer and that her determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

The evidence at the hearing is fairly and adequately set forth in the decision and order of the hearing officer and we adopt her statement for purposes of this appeal. Succinctly, the claimant asserts that she injured her ankle, knee, hip and back in an unwitnessed fall off a curb on employer/carrier's premises while carrying boxes on (date of injury), in the course and scope of her employment. She testified that she immediately, and at several future times, notified her supervisor of the fall and her injuries and was sent on December 2nd to an Clinic by her employer where she saw a (Dr. H) who examined her ankle, opined that the cause of her fall was not work-related and referred her to another doctor, apparently for ongoing pre-existing conditions. Dr. H stated that the claimant indicated she had pain in her right knee, radiating into her back, right thigh and buttocks and that she indicated she had back pain prior to the December 2nd incident. The claimant was seen and treated by several other doctors (she went to a Medical Group following her examination by Dr. H) over the ensuing months and was taken off of work for "sciatica" and "chronic back pain." There was evidence that the claimant suffered from hypertension and had complained of back problems prior to the incident of (date of injury). In any event, the claimant has not returned to work since (date of injury), and according to a medical report in evidence has a "working diagnoses" of "lumbosacral joint disorder and lumbar/sciatic radicular neuralgia."

Although not entirely clear, the claimant testified in substance that she had not been returned to work by her doctors, that she reported to her supervisor that she was taken off work by her doctors, that she is still having back problems and that until she filed with workers' compensation in May, her medical treatments were under her husband's HMO

because she did not know about and was never advised her injury was covered by workers' compensation insurance.

The claimant's supervisor testified that the claimant reported her fall on (date of injury), and that she sent the claimant to a clinic. She stated that the claimant did not indicate she had injured her back at that time but did tell her about a back injury in January 1993 but that she, the supervisor, did not believe the claimant and apparently took no further action. The employer filed a notice of Employer's First Report of Injury or Illness dated (date), which indicated that there was no lost time and that the doctor at the clinic to which the claimant had been sent "could not determine any injury." Because of this report, and not having pertinent medical reports, the employer/carrier's adjuster did not investigate the matter or dispute the compensability of any injury to the claimant until June 17, 1993, and October 15, 1993, respectively.

While there certainly were conflicts and some lack of clarity in the evidence adduced at the hearing, this was a matter for the hearing officer, as the fact finder, to sort out and determine. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Section 410.165(a) and 410.168(a). And, we have previously stated that we will not substitute our judgment for that of the fact finder if there is evidence to support the fact finder's determinations (Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993) even though the evidence may just as reasonably give rise to inferences different from those deemed most reasonable by the fact finder. *See* National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

It is apparent that the hearing officer gave considerable weight to the testimony of the claimant which, like the testimony of other witnesses, may be believed in whole, in part, or not at all. *See* Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ); Texas Employers Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston 1980, writ ref'd n.r.e.). Whether an injury occurred in the course and scope is a question of fact (Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993), as is the issue of whether a claimant has disability. Texas Workers' Compensation Commission Appeal No. 931026, decided December 22, 1993. These matters may be established by the testimony of a claimant. *See* Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). And, a predisposing body infirmity, as there was evidence to indicate existed in this case, will not preclude compensation so long as a work-related injury contributed to disability. U.S. Fidelity and Guaranty Co. v. Herzik, 359 S.W.2d 914 (Tex. Civ. App.-Houston 1962, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 94066, decided February 25, 1994. Where a carrier seeks to avoid liability for a claim when an injury occurs to a claimant having a pre-existing condition, the carrier has the burden of proving that the

condition is the "sole cause." *See* Texas Employers' Insurance Assoc. v. Page, 553 S.W.2d 98 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 94090, decided March 4, 1994; Texas Workers' Compensation Commission Appeal 92211, decided July 10, 1992. And an aggravation of a pre-existing condition is an injury in it own right. *See* Mountain States Mutual Casualty Co. v. Redd, 397 S.W.2d 321 (Tex. Civ. App.-Amarillo 1965, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 94128, decided March 15, 1994. The hearing officer could find an injury in the course and scope of employment and disability from the evidence presented at the hearing.

We find that there is sufficient evidence to support the hearing officer's determination that the employer/carrier did not dispute the compensability of the claimant's injury within 60 days of notification of injury. This may have been prompted by the lack of any immediate investigation or inquiry because of inaccuracies in the Employer's First Report of Injury or Illness dated (date), or because the supervisor did not believe the claimant when she claimed her back and hip were injured at least by January 1993; however, this is not a good or sufficient reason to toll the time requirements contained in Section 409.021(c). Section 409.021(d) does provide that a carrier may reopen the issue of compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. We do not find any abuse of discretion under these particular circumstances for the hearing officer's conclusion that the employer/carrier could reasonably have discovered all evidence related to any contest of compensability of the claimant's injuries within 60 days of (date of injury).

The decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge